

IN THE UNITED STATES DISTRICT COURT
OF WESTERN PENNSYLVANIA

BRIAN FARNETH, on behalf of
himself and all others
similarly situated,

CIVIL DIVISION
No. 13-1062

Plaintiffs,

vs.

WALMART STORES, INC., trading
and doing business as
WALMART,

Defendant.

Transcript of CASE MANAGEMENT CONFERENCE
held on AUGUST 5, 2013
United States District Court, Pittsburgh, Pennsylvania
BEFORE: HONORABLE MARK R. HORNAK, DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Frank G. Salpietro, Esq.
Lori Miller, Esq.
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For the Defendant: Thomas L. Allen, Esq.
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412-201-2660

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1 P R O C E E D I N G S

2 (August 5, 2013. In open court.)

3 THE COURT: This is a preliminary status conference
4 or preliminary case management conference in Civil Action
5 No. 13-1062, which is Brian Farneth, on behalf of himself and
6 others similarly situated, against Walmart Stores, Inc.,
7 trading and doing business as Walmart.8 Will counsel for the plaintiffs, please enter their
9 appearance.10 MR. SALPIETRO: For the plaintiffs, Frank Salpietro
11 and Lori Miller from the law firm of Rothman Gordon.12 THE COURT: Good to see you. Ms. Miller, at some
13 point you will have to file a paper if you could also formally
14 entering your appearance on the docket.15 MS. MILLER: I apologize, Your Honor. I will do
16 that.

17 THE COURT: For the defendant.

18 MR. ALLEN: Your Honor, Tom Allen from Reed Smith
19 for the defendant Walmart Stores, Inc.20 MR. ROCKNEY: Your Honor, Jim Rockney for the
21 defendant Walmart Stores, Inc., also from Reed Smith.22 MR. GELACEK: Your Honor, Zachary Gelacek, also
23 from Reed Smith for defendant Walmart.24 THE COURT: Good to see you, Mr. Gelacek,
25 Mr. Rockney, and Mr. Allen. Thanks for coming in.

1 I know this is a little bit out of the ordinary,
2 but when I saw the notice of removal and reviewed the
3 complaint and the documents that were attached to it, it
4 seemed to me before we all got ourselves excited and off to
5 the races, it would probably be a good idea if we had a
6 preliminary status conference to see what people were thinking
7 about the shape of the case and to the extent appropriate,
8 modify how we handle Rule 26(f).

9 I'm not saying it's necessary or appropriate, but I
10 thought it would be a good idea to talk about that a little
11 bit and get some sense, and I consciously held it around the
12 time and now we will be before when a Rule 12 response would
13 be due otherwise from the defendant.

14 We do have the possibility of class certification
15 here but more importantly, when you read the complaint, it
16 struck me that it is highly possible that there isn't much
17 gray area here.

18 Either what Walmart did in the case of
19 Mr. Farneth's shaving cream purchase was perfectly permissible
20 or it isn't, and the question then is how often does this
21 happen or not happen and maybe what happened with
22 Mr. Farneth -- but I have no reason to doubt on the pleadings
23 he didn't really buy the shaving gel, and before we let a lot
24 of line and reel off the spool here, since it probably is
25 perfectly okay and perfectly not okay, possibly we ought to

1 talk a little bit about that.

2 Mr. Allen, certainly within his client's rights,
3 has filed a motion to stay the action, and this Court relying
4 on the Doctrine of Primary Jurisdiction and the reasoning, if
5 not the opinion, from Chief Judge McLaughlin in Johnson versus
6 Famous Dave's of America and cases that came before it to
7 suggest the case be stayed, so then the Court was also curious
8 about what happens with the money.

9 Does Walmart turn it all over to the Commonwealth
10 other than the one percent collection fee that is authorized
11 by statute for vendors that collect sales tax?

12 If Walmart is over collecting -- I'm not saying
13 they are or aren't -- is whatever money they get in at the
14 point of sale turned over to the Commonwealth of Pennsylvania?

15 Maybe to start with, Mr. Allen or Mr. Rockney or
16 Mr. Gelacek, you could tell us what happens here? What is up?

17 MR. ALLEN: Sure, Your Honor.

18 THE COURT: Counsel can speak from wherever they
19 want and whatever position they want. Make yourself
20 comfortable.

21 MR. ALLEN: To address the last question first, the
22 money is paid to the Commonwealth. Walmart acts, pursuant to
23 the statute, which requires that the vendor collect the sales
24 tax and then transmits that to the Department of Revenue,
25 which is what Walmart does, less the one percent commission.

1 So, that's the answer to that question.

2 Your Honor, as you might expect when you were
3 saying is what Walmart is doing okay or not okay, our position
4 is it's definitely okay --

5 THE COURT: Or at least you have been told it's
6 okay and if it's not okay, no one has shared that with you.

7 MR. ALLEN: -- by the Department of Revenue.

8 Walmart is doing it at the direction of the Department of
9 Revenue, who in some of the correspondence we attached to the
10 brief we filed last week, directed Walmart to not take the
11 coupons into account given the sort of system that Walmart
12 uses.

13 In our view, Your Honor, the reason we went ahead
14 to file the motion to stay -- even in advance of this
15 conference, I gave Mr. Salpietro a heads-up last week we were
16 doing that -- we do think this is an exceptionally clear case
17 for the application of the Doctrine of Primary Jurisdiction.

18 Here is a situation where the plaintiff's case is
19 based largely on the guidelines that were issued by the
20 Department of Revenue. The Department of Revenue has directed
21 Walmart to treat the coupons in a certain manner.

22 So, it does seem like the kind of case where the
23 Department of Revenue should have the opportunity to hear it.
24 There's a procedure for the taxpayer to use to petition for a
25 refund and I think that's the reason the cases we cited, both

1 the Superior Court case and the case from the Eastern District
2 held in a situation like this where the plaintiff is trying to
3 recover sales tax, sales tax refunds, that the Court should
4 invoke the primary jurisdiction doctrine, stay the case and
5 allow the plaintiff to go to the Department of Revenue with
6 their claim.

17 MR. ALLEN: Well, there is a statutory procedure
18 for the plaintiff to pursue a refund with the Department of
19 Revenue. It's my understanding that is initially heard by the
20 Board of Appeals within the Department of Revenue. They have
21 I believe it's six months to make a decision. It's my
22 understanding they can get a further extension of six months
23 to make a decision. In any event, there is a time limit.

24 This is what the Board of Appeals does is hear
25 taxpayers' challenges to taxes.

1 THE COURT: Do they hear them as onesies? Moments
2 from now Mr. Salpietro may tell me there is a modest level of
3 incentive for any one shaving cream, bubble wrap, frozen
4 chicken patty purchaser -- I guess those are tax exempt
5 because they are food -- for any one shopper, unless they
6 happen to buy a Jeep from Walmart, there is a very modest
7 incentive to go through that process to collect seven percent
8 on one can of even high-quality shaving gel.

9 Are these things heard as onesies in Harrisburg or
10 could they hear them collectively or in re: Walmart sales
11 tax?

12 MR. ALLEN: I don't know the answer to that
13 question. I think the point of the cases on primary
14 jurisdiction is that since it is the department's policy and
15 as we mentioned earlier, the revenue goes to the state, goes
16 to the Commonwealth.

17 This is really a case where the Commonwealth has
18 the most at stake financially, that the idea is they need to
19 hear it, apply their expertise, their experience, and make the
20 decision. If the case is to go forward here, it will go
21 forward based on their ruling.

22 THE COURT: Let me ask you this, Mr. Allen. I'm
23 going to make the facts egregious. That doesn't mean I'm
24 likening it to your client's. I'm making them egregious so I
25 can understand your position.

1 Let's assume Walmart decided to collect sales tax
2 and remit it on food, which is plainly it's not prepared food.
3 Those Walmart steaks that are on the TV commercial, they
4 decide we're going to charge seven percent -- we are going to
5 collect seven percent sales tax on them. They do. There is
6 no question that food is exempt from sales tax in
7 Pennsylvania. Walmart does it anyway or some other company,
8 ABC Company.

9 Over the course of the year, they remit half of a
10 million dollars from 50,000 transactions, they remit half a
11 million dollars in sales tax collected on something plainly
12 that should not have been collected on.

13 In that situation, would each of the steak
14 purchasers have to trigger the process that you've identified
15 or do they have a claim against Walmart saying we know you
16 didn't keep the money other than the one percent
17 administrative charge but it's plain as day you shouldn't have
18 collected it.

19 Why do we have to one at a time each, 50,000 of us,
20 trench off to Harrisburg? What do you think about all that?

21 MR. ALLEN: That's pretty similar to the situation
22 in that case from the Eastern District, the Famous Dave's,
23 Johnson versus Famous Dave's case where essentially both sides
24 admitted that Famous Dave's was a bar or restaurant in
25 Philadelphia that had erroneously collected sales tax and

1 notwithstanding that, the Court still held that the taxpayer
2 needed to go, in the first instance, to the Department of
3 Revenue with their claim.

4 So those aren't the facts here, as you know, but I
5 think even in a situation like that based on the Eastern
6 District's decision, at least that was argued by the
7 plaintiff's counsel in that case, that the Court, the Eastern
8 District said the Primary Jurisdiction Doctrine still applies
9 and the taxpayer has to go to the Department of Revenue.

10 THE COURT: You did not argue in your papers some
11 of the many flavors of the Abstention Doctrine where there is
12 an intricate question of state law or ongoing state proceeding
13 or pervasive regulatory scheme. It's not.

14 There's a process under state law and the federal
15 courts are duty bound, I take it, in your estimation, to apply
16 that the same as if I were the Court of Common Pleas at the
17 other end of Grant Street, whether it crosses state, federal
18 membrane, it still exists.

19 MR. ALLEN: We are arguing this is a matter of
20 Pennsylvania subsume law and not based on abstention.

21 THE COURT: I didn't see Burford or Sun Oil or
22 Colorado River Authority or any of the Pullman cases, any of
23 the other ones.

24 Okay. Mr. Salpietro, knowing we are going to give
25 you whatever reasonable time you want to file anything in

1 writing, does it affect your estimation of the case if
2 Walmart, in collecting this money, forked it all over to the
3 Commonwealth of Pennsylvania?

4 Let's assume that to be true, and I have no reason
5 to doubt Mr. Allen's representation, do you need to name --
6 primary jurisdiction aside, do you need to name as a part the
7 people that have the money because my understanding is in
8 Pennsylvania, the vendor acts as the agent, not for the
9 taxpayer but for the Department of Revenue, I think, on sales
10 tax, maybe not on use tax.

11 If I were to hold that primary jurisdiction doesn't
12 slow the wheels down here, do you need to add as a party the
13 people that have the money?

14 MR. SALPIETRO: Your Honor, I think that's one of
15 the issues that you'll be reading about when we do file a
16 response to the motion to stay. In fact, it may very well be
17 a motion -- a response to a motion and maybe an alternate
18 motion for a remand because I do believe that at least under
19 Mr. Allen's view of the world, wherein he is suggesting or
20 Walmart is suggesting that not only do you have to go and get
21 review from the Commonwealth of Pennsylvania, but you also
22 have to get your refund and basically get all your relief from
23 the Commonwealth of Pennsylvania, that leaves nothing for
24 Walmart to have to pay over.

25 Consequently, under that circumstance, it would be

1 our position that under the Class Action Fairness Act, the
2 basis upon which they remove the case doesn't apply because
3 the real primary defendant, by their own admission, is the
4 State of Pennsylvania.

5 THE COURT: They are not at risk for five million
6 dollars. Is that the CAFA number, you have to have at least
7 five million on the table?

8 MR. ALLEN: Yes.

9 THE COURT: You are saying they are not at risk for
10 five million bucks, so there is no basis to move?

11 MR. SALPIETRO: They may be at risk but when you
12 bring them up here under the exception, which I think is
13 (d) (5) (A), the removal does not apply or isn't permitted when
14 the primary defendant is going to be the state because there's
15 a question as to whether this Court, with due respect, can
16 order the state to do anything.

17 THE COURT: Would the Eleventh Amendment bar this
18 case or the Anti-Tax Injunction Act bar this case? Is this
19 aimed at seeking to impair the collection of a tax? I don't
20 know the answer to my question.

21 MR. SALPIETRO: I don't know the answer.

22 THE COURT: Would the Eleventh Amendment bar the
23 state being a party here?

24 MR. SALPIETRO: I don't know, Your Honor.

25 THE COURT: I don't know either. Mr. Allen, any

1 thoughts on that?

2 MR. ALLEN: It is something we are looking at but
3 I'm not prepared to state definitively our view on it.

4 THE COURT: This isn't jeopardy. There is no
5 requirement to buzz in quickly.

6 MR. SALPIETRO: The way that it is being cast by
7 Walmart in terms of their motion for stay is really as an all
8 or nothing proposition. Despite calling it a motion for stay,
9 essentially they are saying everything, including the money,
10 has to come from the Commonwealth and not from Walmart. You
11 should let us go there first.

12 The problem is that's not true respectively. We
13 know, for example, there is a revenue ruling that has been
14 made public, and I don't have it off the top of my head, it
15 will be in our papers, certainly, that indicates that many,
16 Walmart or people in the position of Walmart, would be able to
17 pay the money to the end user, i.e., the consumer and then in
18 turn, turn around and get a credit from the Department of
19 Revenue.

20 It's not that a refund has to come from the
21 Department. It's possible -- and by their own admission, the
22 experts have said that Walmart can pay the money back and then
23 take a credit on their tax returns.

24 So --

25 THE COURT: You are saying there is more than one

1 || avenue to the taxpayer.

2 MR. SALPIETRO: Yes. Walmart's position thus far
3 has been you have to have stay under Neiman Marcus or Dave's,
4 the only avenue is for the taxpayer to go and ask for the
5 refund directly. We don't think that is it.

6 THE COURT: From then Secretary Fajt or younger
7 looking then Secretary Fajt in this petition for stay, he
8 talks about this, and the Revenue Department says on those buy
9 one, get one, that you deduct the coupon amount from the
10 taxable portion of the purchase price, if the receipt
11 describes both the item purchased and the coupon that applies
12 to it.

13 This ensures that a coupon relating to a
14 non-taxable item will not reduce the taxable purchase price
15 and protects the retailer by showing why the taxable price was
16 reduced.

17 It says, The Department interprets the requirement
18 of a description to mean that the cash register receipt makes
19 a clear reference to the item and the coupon related to it or
20 a clear reference that there is an amount deducted on any
21 purchase or a percentage discount on all items listed, whether
22 taxable or not.

23 Then the receipt, which is attached to both the
24 complaint and the motion to stay, shows two cans of shaving
25 gel. We know that because it uses the phrase shaving gel,

1 \$2.97 each. Then it says coupon, 47, 400, 2.97 with a minus
2 sign and a zero after it.

3 I guess the question is does this meet the
4 requirements of Secretary Fajt's directives, then Secretary
5 Fajt's directives, and, that is, with the receipt in this
6 form, is it your position as the plaintiffs that Walmart had
7 the discretion to -- that this was good enough? This coupon
8 clearly relates to the shaving gel and, therefore, there
9 should not have been tax on the second \$2.97?

10 MR. SALPIETRO: A couple ways to respond to that.
11 The answer is yes.

12 I should take a few steps back and note that
13 Secretary Fajt's newsletter, which is very similar to what we
14 cited in our complaint, is from 2005 and, of course, the
15 technology has come leaps and bounds beyond what we had in
16 2005, which, by the way, is when they received their letter
17 ruling from the Commonwealth of Pennsylvania or at least from
18 the General Counsel, Department of Revenue.

19 In fact, the way the coupons are not only coded,
20 which is different than in 2005, but the way the POS systems
21 have responded universally to those codings makes it very
22 clear that what happened in this particular case clearly meets
23 the requirements of the Pennsylvania regulation.

24 The identification in this case of the shaving gel
25 and the identification of the coupon relating to the shaving

1 gel --

2 THE COURT: Although there was nothing else
3 purchased other than shaving gel.

4 MR. SALPIETRO: In this case, that's right.

5 THE COURT: Let me ask you this, Mr. Salpietro.

6 Did your client go to Walmart for the sole purpose of buying
7 shaving gel or was there also a purpose of buying shaving gel
8 and then becoming a plaintiff in the lawsuit or did he just
9 happen to need some shaving gel?

10 MR. SALPIETRO: I don't know. He went to buy
11 shaving gel and he went to buy that and he took money out in
12 addition but --

13 THE COURT: He got \$40 back.

14 MR. SALPIETRO: I don't know what the motivation
15 was.

16 THE COURT: Okay. Mr. Allen, does Walmart in
17 2000 -- on June 8, 2013, does it use the same point of sale
18 technology that was used in 2005 when it got the letter from
19 the GC?

20 MR. ALLEN: My understanding, Your Honor, is that
21 the technology is the same as was described in the letter
22 dated August 11, 2005, that we submitted with our brief.

23 THE COURT: Let me ask you this.

24 Presumably Walmart or any retailer -- I'm not
25 saying this directly as to Walmart -- but any retailer could

1 have on their receipt as much detail as they wanted. If
2 Walmart wanted to have coupon shaving gel, presumably, it
3 could do that.

4 Do you believe this receipt complies with -- strike
5 that. Let me repeat that and get it correct here.

6 The receipt as it's printed, does it meet the
7 explanation from Secretary Fajt and from the General Counsel
8 as to detail as to what the coupon applies to and if it
9 doesn't, is that a matter of choice by Walmart?

10 MR. ALLEN: Well, first of all, I think the answer
11 is that it doesn't meet the Department of Revenue requirements
12 because in the letter from Office of Chief Counsel of the
13 Revenue Department, the system is described and it's
14 described, Your Honor, by the codes by the coupon. There are,
15 as I understand it, manufacturer's codes.

16 So, it is possible, as I understand it, as is
17 explained in the letter from Walmart, that the
18 manufacturer -- you can show where a coupon -- there is a
19 coupon for a manufacturer and an item purchased from that same
20 manufacturer and that's what led to the Walmart inquiry in
21 2005. Is this enough for us to take coupons into account?

22 The Department of Revenue says in their letter, no,
23 it's not, and they explain the issue of when there's multiple
24 items and some are taxable and some are non-taxable. It goes
25 on at the bottom of Page 3, the chief counsel says, As the

1 proposed POS, point of sale, system does not allow a specific
2 coupon to be tied to a specific item in all situations,
3 Walmart may not deduct the value of manufacturers' coupons
4 from the purchase price of items prior to calculating the
5 sales tax.

6 That's the direction that Walmart has been
7 following is that because the system did not allow the coupons
8 to be matched with the items in all situations --

9 THE COURT: Whether it was, in fact, matched in a
10 specific situation because the only thing purchased was
11 shaving gel.

12 MR. ALLEN: Right, in this particular situation,
13 where there is only one item.

14 Now, the plaintiff's case here is much broader than
15 that, at least as I read it in the complaint. It's
16 challenging the "all situations" even where multiple products
17 were purchased.

18 THE COURT: So, somebody had a BOGO coupon when
19 they were doing their monthly, weekly, biweekly shopping and
20 had two carts full of stuff, including groceries and clothing,
21 which are not taxable, and they also bought shaving gel and
22 had the BOGO coupon, you would see these three entries on that
23 receipt along with perhaps 50 other ones and because the minus
24 \$2.97 portion of the receipt would not be expressly tied to a
25 taxable product, therefore, Walmart could not reduce the

1 purchase price, whether it wanted to or not, by that amount.

2 MR. ALLEN: That's the position of the Revenue
3 Department.

4 THE COURT: Does Walmart have any incentive,
5 Mr. Salpietro, to collect too much tax?

6 MR. SALPIETRO: To collect too much tax?

7 THE COURT: Would they have any incentive, putting
8 their most nefarious hat on, do they have any incentive to
9 collect tax in circumstances where it is not collected?

10 MR. SALPIETRO: Yes. One is the one percent
11 commission.

12 Two, I would suspect in order to change the system
13 for Pennsylvania, specifically, that there is going to have to
14 be some sort of modification to their existing POS system,
15 which they hope to use nationwide, but I think it's required.

16 So, at least in those two instances, there is an
17 incentive to collect too much tax by sort of sweeping under
18 the rug the idea they have to go through these steps in order
19 to reduce the amount.

20 THE COURT: Mr. Allen, is the one percent one
21 percent of the sales tax or is it one percent of the purchase
22 price? That is, does one percent mean Walmart in Allegheny
23 County collects seven percent but pays six percent over to
24 Pennsylvania or does it collect seven percent and pays 99
25 percent of seven percent over to Pennsylvania?

1 MR. ALLEN: The one percent is a percentage of the
2 tax, amount of the tax that's collected.

3 THE COURT: So if Walmart was viewing as a profit
4 center the overtaxation of consumers, it would be in order to
5 get one percent of the sales tax collected on the free item in
6 a BOGO?

7 MR. ALLEN: Yes.

8 THE COURT: Is your case only about BOGO?

9 MR. SALPIETRO: No. All manufacturing coupons are
10 included in the concept.

11 THE COURT: Okay. So it's for one percent of the
12 sales tax. If Walmart collected -- I'm just picking a number
13 here -- for them to make an extra million bucks, they would
14 have to over collect \$100 million in tax coupons, is that what
15 you're saying, Mr. Allen?

16 MR. ALLEN: I believe that's right, if the math is
17 correct.

18 THE COURT: I pick things with a hundred.

19 MR. ALLEN: Right.

20 THE COURT: So you think that is what they are up
21 to, Mr. Salpietro?

22 MR. SALPIETRO: I think that's part of what they
23 are up to but I think whether deliberate or otherwise, they
24 shouldn't be collecting the tax and they are.

25 Now, they're saying it's because of this 2005

1 letter, which, as the Court may very well know, is now stale
2 because those type of rulings in that letter are only good for
3 five years.

4 THE COURT: Do you have any reason to believe the
5 current Secretary of Revenue -- I apologize for not knowing
6 who that is -- do you have any reason to believe the Chief
7 Counsel's Office, Secretary of Revenue presented with the same
8 facts would issue a different ruling today?

9 MR. SALPIETRO: I do believe that because of
10 certain things. First of all, of course what Walmart is told
11 by the Department of Revenue based on their 2005 letter is
12 always a function of what information they provide to the
13 Department of Revenue in the first instance.

14 What we will see as we get into the response to the
15 motion to stay is they did not provide a full explanation of
16 what the coupons really mean.

17 There is a portion of coupon both in 2005 and
18 today, more explicit today that is called a family code or
19 product code that specifically identifies the exact items that
20 are tied to the cash register.

21 So, for example, if I go into the Walmart, as the
22 Court suggested, and I buy 50 items, one thing I don't buy is
23 shaving gel, and I give them the coupon and as they scan
24 through, it will not stop. If I have to buy three to get a
25 discount and I buy two, the same thing.

1 The coupon is coded in such a way it is tied to a
2 specific item and it is tied to a specific number based on the
3 code.

4 That was in 2005 as well and carries on into the
5 future.

6 So, no where in at least what we have seen thus far
7 has Walmart provided that level of explanation to the
8 Department of Revenue in order to get the ruling that they got
9 in 2005, but beyond that, and aside from the fact it became
10 stale in 2010 because it's only good for five years, you will
11 soon see, I hope, that the protocol for coupons has changed to
12 universally where all retailers are on board, including
13 Walmart, such that in 2008 and 2011, the whole way in which
14 coupons are coded has changed.

15 It is -- they are coded in such a way, including
16 the product and family code I talked about, that would make it
17 virtually impossible not to have a situation where the receipt
18 matches up with the coupon.

19 THE COURT: Well, it would appear to -- as the
20 father of five, I won't say I'm a professional shopper but I
21 perhaps had more experience than some others have had. Even I
22 can tell it sure looked like the coupon related to the shaving
23 gel, especially since the only thing purchased was shaving
24 gel, but even if -- because the focus at Procter & Gamble or
25 L'Oreal or whoever wants to make sure they're not redeeming

1 coupons because that's ultimately who redeems them, they are
2 not redeeming coupons in a situation where the consumer
3 doesn't use the coupon the way it was designed to use or a
4 vendor was seeking recovery for something they are not
5 entitled to recover for, that's all sort of behind the
6 curtain.

7 If it doesn't show up on the receipt that the
8 coupon was for the sunscreen or the coupon toothpaste is
9 exempt, the coupon wasn't for the paper towel, which I think
10 are not exempt, if that doesn't show up on the receipt for
11 state tax purposes, does all of that modern behind-the-scene
12 stuff even matter?

13 Isn't your gripe or real question is can Walmart or
14 anyone in Walmart's shoes decide not to upgrade their point of
15 sale system to show all that it can show on its receipt?

16 If the state says no, the receipt has to clearly
17 show the product that the coupon relates to, is it good
18 enough, Mr. Allen, if Walmart says our system doesn't do that
19 or do you have to answer the next question and we decided not
20 to upgrade our system to do that even though that's
21 technically possible?

22 MR. ALLEN: Your Honor, the claim in this case, as
23 I understand it, is that there was sales tax that was
24 collected that was not owed.

25 So, I don't think the issue of whether the sales

1 tax was properly collected in any way turns on does Walmart
2 have a legal obligation to have a computer system that leads
3 to the minimum tax.

4 THE COURT: That's a better way of putting my
5 question.

6 MR. ALLEN: I didn't understand that was the
7 plaintiff's claim and I don't know the answer to that
8 question.

9 My gut reaction is no, that it's a matter of what's
10 the system that Walmart has and then the issue is does it
11 generate the receipt in the manner that the Department of
12 Revenue requires.

13 THE COURT: If it turns out as a substantive
14 matter, and I'm not saying this is, but if it turns out this
15 way, Mr. Farneth did not owe sales tax on the second can of
16 shaving gel as a substantive law matter and Walmart, in fact,
17 collected it but that Walmart's receipt is not in a form that
18 relieves it of the duty to collect it, what happens then?
19 What are the rights and duties of the parties then?

20 If Mr. Farneth didn't know the tax, Walmart
21 collected it, gave it to the state, and the form of receipt
22 would not permit Walmart to not collect it, is that all okay?

23 MR. ALLEN: If I understand the question, and I
24 apologize if I don't, the Department of Revenue has directed
25 when the sales tax is to be collected and has also directed

1 what kind of receipt needs to be generated to justify taking
2 the coupons into account.

3 That seems to me is the key obligation whether
4 Walmart is entitled to collect the tax or not. If the receipt
5 does not meet the requirements of the Department of Revenue,
6 then Walmart is obligated to collect the tax and pay it to the
7 Commonwealth.

8 THE COURT: I guess my question is if Mr. Farneth
9 substantively is not obligated to pay it because Walmart isn't
10 paying the tax, it's collecting it from Mr. Farneth, if
11 Mr. Farneth has no underlying duty to pay the tax because it's
12 a BOGO and it doesn't require an after sale activity like pay
13 your bill faster and those sorts of things, he has the right
14 coupon to get the BOGO, he has no obligation to pay the tax.

15 If you didn't collect it, he would not be required
16 to pay use tax on Can 2 of the shaving gel, but Walmart says
17 we are obligated to collect it, Mr. Farneth, and the reason is
18 or part of the reason is our receipt doesn't directly tie the
19 coupon to the product.

20 Doesn't Mr. Farneth have a gripe, maybe not one the
21 law could do anything about, but a gripe to say, wait a
22 second, I will concede you are obligated to collect the tax,
23 but the reason you are obligated to collect it isn't because I
24 actually owe it, it's because your receipt isn't in the right
25 form and that's not something the Mr. Farneths of the world

1 can do anything about?

2 If that turns out to be the situation, I'm not
3 implying any bad motives but that just is the way it is, is
4 that -- does that create any legally cognizable relief?

5 MR. ALLEN: I think, first of all, if he has a
6 gripe, it's with the Revenue Department.

7 What I think the Revenue Department would say, as I
8 understand it, based on the statute and regulations and this
9 guidance, their position is they're entitled to six or seven
10 percent of the purchase price, that the purchase price -- in
11 calculating the purchase price, coupons can be taken into
12 account but only if the receipt allows those specific items to
13 be matched to a specific coupon.

14 I think the Revenue Department's position would be
15 if the receipt doesn't meet that requirement, then Mr. Farneth
16 does owe the tax.

17 THE COURT: Does it, therefore, mean that
18 unilaterally any vendor of goods could decide -- and this is
19 the second prong when I asked Mr. Salpietro how could Walmart,
20 why would Walmart, if it is choosing to collect too much tax,
21 what's in it for them -- could any vendor, whether it's
22 Harry's corner store or Walmart, say, you know what, we
23 control what's on the receipts, we're just not going to make
24 the receipts compliant. We have all sorts of business
25 reasons, it's a pain, an aggravation, we would have to pay

1 someone \$600 to upgrade the software, we aren't going to do
2 that and it's no skin off our hide because we just collect
3 more money, it's easier?

4 Can a vendor elect, in essence, decide, to collect
5 too much tax and say I'm obligated to collect too much tax and
6 the reason is the form of the receipt, which I'm in control
7 of, doesn't excuse me from the obligation to collect.

8 MR. ALLEN: I don't know the answer to that
9 question and as I understand it, that's not the plaintiff's
10 case but I will -- the letter we submitted from March 2005
11 was, on its face, is Walmart saying we think our system is
12 sufficient for us to take the coupons into account.

13 THE COURT: And we want to have everyday prices so
14 we want to charge less.

15 MR. ALLEN: Exactly, and the Department of Revenue
16 came back and said no, it isn't.

17 THE COURT: Mr. Salpietro, does the law require the
18 Walmarts of the world or Harry's corner store to do everything
19 within their power to reduce the amount of sales tax that's
20 collected?

21 Could they lawfully decide, you know what, we took
22 our shot, the Department of Revenue says unless you change
23 your receipts, you got to collect the tax and we're not
24 changing our receipts, is that against the law?

25 MR. SALPIETRO: Is it against the law? I don't

1 know but probably not, quite honestly, but in light of the
2 fact that Walmart is saying we can do this, they say in their
3 letter in March we have the capability of taking tax off, we
4 want to take the tax off, what should we do --

5 THE COURT: Their March of '05 letter?

6 MR. SALPIETRO: Yes. Particularly in light of the
7 fact the new technology that comes along, you would think they
8 not only want to do it but should do it for the customers.

9 Is there a legal obligation? Not knowing the
10 answer, my gut tells me no.

11 THE COURT: You need to research that.

12 MR. SALPIETRO: I need to research that.

13 THE COURT: Okay. Mr. Salpietro, why don't we do
14 this. How much time would you and Ms. Miller like to respond
15 to the stay motion with whatever you want to respond with?

16 MR. SALPIETRO: One of the questions we were going
17 to ask you under your order for motion practice, we didn't
18 know if it was a seven or 14-day.

19 THE COURT: That's one of the reasons we are here.
20 We try not to play gotcha justice. I don't think any of my
21 colleagues do either. Within reason, how many days do you
22 want?

23 MR. SALPIETRO: 14 days should be sufficient.

24 THE COURT: Okay. We'll make that 14 days from
25 tomorrow, so any response you want to submit will be due by

1 August 20th.

2 Mr. Allen, how much time do you want for a reply,
3 if you elect to reply? You don't have to. Rather than having
4 asked --

5 MR. ALLEN: We can do a reply in seven days.

6 THE COURT: Because there is a possibility
7 Mr. Salpietro's response may have buried in it some other form
8 of motion, we'll give you 14 days after the 20th. We'll make
9 that a date certain -- we'll make your reply due September 4th,
10 which is a Wednesday.

11 Then, depending on what they say, I may have
12 argument on that.

13 Is anybody going to be prejudiced if we stay all
14 26(f) and discovery and other pretrial activity until we get
15 these briefs in and decided?

16 Mr. Salpietro, does that prejudice your client?

17 MR. SALPIETRO: Not in the way that the Court has
18 stated it.

19 My concern, and it's something I'll address in the
20 brief, if the Court decides to stay the case, one of the
21 issues that needs to be addressed in terms of what we submit
22 would be to address -- tailor the relief. What do we get to
23 do once the stay is imposed. If we get to Revenue, we want
24 this relief on behalf of everybody.

25 THE COURT: And they say we do onesies.

1 MR. SALPIETRO: Or who is everybody. In which
2 case, we have to take discovery from Walmart and find out who
3 everybody is. Those are issues but in the simplest form and
4 at its first level, the answer to your question is no, we're
5 not prejudiced by not doing anything until the Court has a
6 chance to consider it.

13 MR. ALLEN: Yes. I know internally Walmart has
14 very strict procedures about that.

20 MR. ALLEN: I will double-check.

24 We'll enter a text order today that will give you
25 that time, Mr. Salpietro and Mr. Allen, puts a hold on

1 anyone's obligation to do a 26(f) report or ADR stipulation,
2 anything like that. We'll stay all discovery for the time
3 being.

4 What I would ask if I don't stay the case, I may
5 put this online for a fairly fast track initial mediation so
6 if counsel could at least be talking with one another about a
7 nominee if we go there.

8 Mr. Salpietro?

9 MR. SALPIETRO: We have already filed per your
10 order stipulation.

11 THE COURT: That's right. Who did you folks
12 select?

13 MR. SALPIETRO: Jim Brown.

14 THE COURT: Okay. You have someone ready to go.
15 If you want to, you can mediate with Mr. Brown. I'm not going
16 to obligate it. We have him on stay. Mr. Salpietro, thank
17 you for reminding me of what I should have remembered. I
18 appreciate that.

19 Let's keep that on hold. If you want to do it, I'm
20 not going to get in your way. Let's see where we stand on the
21 stay session.

22 Does that work for you, Mr. Salpietro and
23 Ms. Miller?

24 MR. SALPIETRO: Yes.

25 MS. MILLER: Yes.

1 MR. ALLEN: Can I clarify that also applies to our
2 responsive pleading?

3 THE COURT: Do you anticipate if I didn't apply it
4 to your responsive pleading, you would be filing an answer or
5 some form of Rule 12(b) motion?

6 MR. ALLEN: I believe we would, yes.

7 THE COURT: Okay. Do you have any sense without
8 looking at you, in general, what the grounds to that would be?

9 MR. ALLEN: Well, there are a number of grounds we
10 are in the process of sorting out but, frankly, the central
11 issue is an issue you already touched on, which is the fact
12 the money went to the Commonwealth, so there are a number of
13 potential arguments, including exhaustion of administrative
14 remedy, issues as to whether the Commonwealth is an
15 indispensable party, and we have different arguments we would
16 make as to whether some of the claims were properly pled.

17 For example, there's a claim for constructive
18 trust, the theory being Walmart is a constructive trustee for
19 its customers.

20 The tax statute provides clearly when we collect
21 the money, we hold it in trust for the Commonwealth, not for
22 the customer.

23 There are a number of arguments we would be making.

24 THE COURT: What would you prefer to do?

25 MR. ALLEN: I would prefer to be able to postpone

1 our obligation to respond.

2 THE COURT: I'll do that. I try to handle
3 preferences from either counsel.

4 Mr. Salpietro has given us an early warning among
5 the things he may attach to his response is a recent Revenue
6 ruling which seems to indicate the only avenue is not just
7 from the Department of Revenue, that may be from your side,
8 also.

9 Let's give Mr. Salpietro the opportunity to do
10 that. Let's see where we are when I get all the briefing in
11 on the stay.

12 We may have another conference or
13 conference/argument and then we can take up at that time, one,
14 what Mr. Salpietro says in his papers may influence your
15 thinking in regards to what you would be filing. So, rather
16 than having you off to the races doing something that
17 Mr. Salpietro's papers may convince you to modify or go in a
18 different direction or not go at all, we'll put on hold your
19 obligation to respond under Rule 12 pending further Order of
20 Court.

21 Does that work for you, Mr. Salpietro?

22 MR. SALPIETRO: Yes.

23 THE COURT: We'll do that and mid September, my
24 guess is we'll be all back together.

25 Mr. Salpietro, anything else we ought to take care

1 up today?

2 MR. SALPIETRO: No.

3 THE COURT: Ms. Miller?

4 MS. MILLER: No.

5 THE COURT: Mr. Allen and team?

6 MR. ALLEN: No.

7 THE COURT: Ms. Wojdowski, anything we have not
8 taken up with these folks that we have not talked about?

9 THE LAW CLERK: No.

10 THE COURT: That will conclude the conference.

11 We'll get a text order out and relieve people of all sorts of
12 obligations and states the date. We'll wait to see your
13 papers on the stay.

14 (Whereupon, the above hearing concluded at
15 2:25 p.m.)

16 - - -

17 I hereby certify by my original signature herein,
18 that the foregoing is a correct transcript, to the best of my
19 ability, from the record of proceedings in the above-entitled
20 matter.

21

22 S/ Karen M. Earley

23 Karen M. Earley

24 Certified Realtime Reporter

25